Editor's note: 89 I.D. 82; Reconsideration denied by order dated June 29, 1982

DANIEL A. ENGELHARDT
(ON RECONSIDERATION)

IBLA 81-975 Decided February 26, 1982

Reconsideration of a prior Board decision, 61 IBLA 65 (1981), that set aside a decision of the Utah State Office of the Bureau of Land Management rejecting appellant's application for a noncompetitive oil and gas lease, and ordered a hearing. U 46710.

Previous Board decision set aside and BLM decision affirmed as modified.

1. Mineral Leasing Act: Generally -- Mineral Leasing Act: Combined Hydrocarbon Leases -- Mineral Leasing Act: Lands Subject To -- Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Competitive Leases -- Oil and Gas Leases: Lands Subject To -- Tar Sands: Generally

   The Combined Hydrocarbon Leasing Act of 1981, P.L. 97-78, 95 Stat. 1070, amended the Mineral Leasing Act of 1920, Sec. 17(b), 30 U.S.C. § 226(b) (1976), to require competitive bidding in the leasing of lands within special tar sand areas, and appellant's simultaneous oil and gas lease application, being noncompetitive, must be rejected for a parcel within a special tar sand area.

2. Mineral Leasing Act: Generally -- Mineral Leasing Act: Combined Hydrocarbon Leases -- Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Competitive Leases -- Tar Sands: Generally

An applicant for a Federal oil and gas lease has no rights in the land or its minerals until the lease is issued to him. The Secretary of the Interior is not required to, but "may" issue a lease for any given tract. Therefore, BLM can properly reject a first-drawn simultaneous application where before issuance of the lease the parcel won in the drawing is included in a special tar sand area, and thereby leasable only through competitive bidding, pursuant to the Mineral Leasing Act of 1920, as amended by the Combined Hydrocarbon Leasing Act of 1981.

APPEARANCES: Craig R. Carver, Esq., Denver, Colorado, for appellant;

William R. Murray, Jr., Esq., Office of the Solicitor, Department of the Interior, for BLM.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

By decision of August 5, 1981, the Utah State Office, Bureau of Land Management (BLM), rejected simultaneous oil and gas lease application U-46710, submitted by Daniel A. Engelhardt, because the land involved had been determined to be within a known geologic structure (KGS) and therefore open to competitive bidding only. 1/ Engelhardt appealed. Our decision

1/ Engelhardt's simultaneous oil and gas lease application, U-46710, was drawn with first priority for parcel UT 128 in the July 1980 drawing. Parcel UT 128 included the E 1/2, W 1/2 W 1/2, SE 1/4 NW 1/4, SE 1/4 SW 1/4 sec. 13, all sec. 14, N 1/2 sec. 15, S 1/2 sec. 22, N 1/2 sec. 23, N 1/2 NE 1/4, SW 1/4 NE 1/4, NW 1/4 sec. 24, N 1/2, SE 1/4 sec. 27, E 1/2 sec. 34, T. 15 S., R. 22 E., Salt Lake meridian. The lands in secs. 22, 27, and 34 were determined to be within an undefined addition to the Greater San Arroyo-Bar X KGS

in that case, Daniel A. Engelhardt, 61 IBLA 65 (1981), set aside the BLM decision and ordered a hearing to resolve certain issues of fact regarding the KGS determination. On January 28, 1982, the Board received a petition for reconsideration from the Office of the Solicitor. Having reviewed that petition, we find it meritorious and on reconsideration we set aside our previous decision and affirm BLM's decision of August 5, 1981, as modified herein.

[1] Subsequent to the BLM decision, on November 16, 1981, Congress enacted the Combined Hydrocarbon Leasing Act of 1981 (CHLA), P.L. 97-78, 95 Stat. 1070, which amended several provisions of the Mineral Leasing Act of 1920 (MLA). Section 4 of CHLA amends section 1 of MLA, 30 U.S.C. § 181 (1976), by adding after the first paragraph the following new paragraphs:

> The term "oil" shall embrace all nongaseous hydrocarbon substances other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons).
>
> The term "combined hydrocarbon lease" shall refer to a lease issued in a special tar sand area pursuant to section 17 after the date of enactment of the Combined Hydrocarbon Leasing Act of 1981.
>
> The term "special tar sand area" means (1) an area designated by the Secretary of the Interior's orders of November 20, 1980 (45 FR 76800-76801) and January 21, 1981 (46 FR 6077-6078) as containing substantial deposits of tar sand.

Section 6(a) of CHLA amended section 17(b) of MLA, 30 U.S.C. § 226(b), by adding a new subsection, part of which states that "[i]f the lands to be leased are within a special tar sand area, they shall be leased to the

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effective Sept. 2, 1980. The remaining lands in the application were determined to be within a further undefined addition to the Greater San Arroyo-Bar X KGS effective Dec. 2, 1980.

highest responsible qualified bidder by competitive bidding under general regulations * * *." 2/

In support of the petition for reconsideration is a memorandum dated January 13, 1982, from the BLM Utah State Director, which states in part:

> The rejection of oil and gas lease offer U-46710 was based entirely on the KGS determination. However, all of the lands in U-46710 are also within the P. R. Spring Designated Tar Sand Area established by the Geological Survey, effective September 23, 1980, and outlined in their memorandum of November 5, 1980. A copy of this memorandum is enclosed.

Geological Survey publicly announced the establishment of that designated tar sand area by publication at 45 FR 76800-76801 (Nov. 20, 1980).

[2] Section 4 of CHLA has expressly declared that area to be a "special tar sand area," which, under section 6(a), can be leased only by competitive

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2/ Sec. 6 of CHLA states:

"(6)(a) Section 17(b) of such Act (30 U.S.C. 226(b)) is amended by inserting '(1)' after '(b)' and adding a new subsection to read as follows: "'(2) If the lands to be leased are within a special tar sand area, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than five thousand one hundred and twenty acres, which shall be as nearly compact as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary. Royalty shall be 12-1/2 per centum in amount or value of production removed or sold from the lease, subject to section 17(k)(1)(c). The Secretary may lease such additional lands in special tar sand areas as may be required in support of any operations necessary for the recovery of tar sands.'

"(b) Section 17(c) of such Act (30 U.S.C. 226(c)) is amended by deleting 'within any known geological structure of a producing oil or gas field,' and inserting in lieu thereof 'subject to leasing under subsection (b),'.

"(c) Section 17(e) of such Act (30 U.S.C. 226(e)) is amended by inserting before the period at the end of the first sentence the following: ':Provided, however, That competitive leases issued in special tar sand areas shall also be for a primary term of ten years.'"

bidding. The question of the existence of a KGS is now irrelevant to the adjudication of Engelhardt's lease application, and therefore the hearing is no longer necessary. We are aware that the parcel won by Engelhardt in the simultaneous drawing was not designated a tar sand area until September 23, 1980, which was several weeks after the drawing. But that fact has no bearing on the necessary disposition of this case, because an applicant for a Federal oil and gas lease has no rights in the land or its minerals until the lease is issued to him. Under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 226(a) (1976), the Secretary of the Interior "may" lease lands subject to disposition under that Act which are known or believed to contain oil or gas deposits. But the word "may" is permissive, and does not require the Secretary to issue leases; he has the discretion to refuse to issue any lease at all on a given tract. Udall v. Tallman, 380 U.S. 1 (1965); Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976), cert. denied, 425 U.S. 973 (1976). Such discretion may be exercised for any purpose in the public interest, Lee B. Williamson, 54 IBLA 326 (1981), and the public's clear interest in development of the diverse minerals present in designated tar sand areas was evidenced by Congress' enactment of CHLA. Moreover, beyond the question of Secretarial discretion, ultimate control of the disposition of public lands and resources belongs to Congress, and the responsibility of the Interior Department is to administer them in accordance with the dictates of the legislative branch. Since appellant's lease application was still pending on the date CHLA took effect, and was nonconforming thereunder, it must be rejected. 3/ No oil and gas lease may issue to Engelhardt

3/ It might be argued that because the special tar sand area including parcel UT 128 was not so designated until after Engelhardt's success in the simultaneous drawing, CHLA should not have effect in this case and the Board's initial decision should remain in force. But sec. (4) of CHLA, supra, militates

on his simultaneous oil and gas lease application, because parcel UT 128 is within a special tar sand area, which is leasable only through competitive bidding.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the prior Board decision, 61 IBLA 65 (1981), is set aside, and the BLM decision is affirmed as modified.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge

against such an argument by distinguishing all leases issued or to be issued "in a special tar sand area pursuant to section 17 [of MLA] after the date of enactment of" CHLA as "combined hydrocarbon lease[s]," indicating no deference for successful lease applications drawn before the designation of the tar sand areas. Sec. 8 of CHLA also clearly implies that CHLA applies to all leases not outstanding on Nov. 16, 1981. Likewise, sec. (6)(a) of CHLA cannot reasonably be read as affording appellant any relief: "'(2) If the lands to be leased are within a special tar sand area [regardless of whether the area's designation or the simultaneous drawing had priority in time, so long as the lease had not issued before the enactment of CHLA], they shall be leased to the highest responsible qualified bidder by competitive bidding * * *.'"